

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

ABC CELLULAR CORPORATION )  
PAGE NOW, INC. / ABC PAGING, INC. )  
ID #815534 )

Docket 96-45 and 97-21

Request for Review of )  
Universal Service Administrator Decision )

To: The Commission

### **REQUEST FOR REVIEW**

ABC Cellular Corporation Page Now, Inc. / ABC Paging, Inc. ("ABC Cellular"), through counsel and pursuant to Section 54.719 of the Commission's Rules, 47 C.F.R. § 54.719 hereby respectfully requests that the Commission review the April 19, 2001, decision of the Administrator for the Universal Service Administrative Company ("USAC")<sup>1</sup> denying ABC's request to submit a revised FCC Form 499Q. This request is timely filed pursuant to the applicable Commission Rules.<sup>2</sup> In support thereof, the following is shown:

### **I. BACKGROUND**

From 1994 until 2001, ABC Cellular served as a local paging carrier in South Florida that provided services to local resellers. The Commission has recognized a safe harbor of interstate

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<sup>1</sup> A copy of the decision is attached as Exhibit 1 hereto.

<sup>2</sup> 47 C.F.R. § 54.720 (a), temporarily amended by In the Matter of Implementation of Interim Filing Procedures for Filing Requests for Review, Order, FCC 01-376, CC Docket 96-45 (released December 26, 2001) (extending 30 day filing window to 60 day filing window based on the events of September 11<sup>th</sup>).

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revenues of 12% for paging companies.<sup>3</sup> Paging companies that avail themselves of the safe harbor “may assume that the Commission will not find it necessary to review or question the data underlying their reported percentages.”<sup>4</sup> Paging providers that wish to report a percentage less than the 12% safe harbor “should document the method used to calculate its percentage and make that information available to the Commission or Administrator upon request.”<sup>5</sup> As a result, the Commission concluded that, “based on this safe harbor, a significant number of pager providers are not required to contribute based on the de minimis exception.”<sup>6</sup> As ABC Cellular’s interstate revenue has always been equal to or less than 12%, and its universal contribution has been less than \$10,000 in a given year, ABC Cellular is “not required to submit a contribution or Telecommunications Reporting Worksheet.”<sup>7</sup>

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<sup>3</sup> Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 98-278, 13 FCC Rcd 21252 (released October 26, 1998) at ¶ 14 (“paging providers that report at least 12 percent of their paging revenues as interstate will not be asked by the Commission to provide documentation supporting their reported level of interstate telecommunications revenues.”)

<sup>4</sup> *Id.* at ¶ 11.

<sup>5</sup> *Id.*

<sup>6</sup> Federal-State Joint Board on Universal Service, Further Notice of Proposed Rulemaking and Report and Order, FCC 02-43, 25 CR 1451 (released February 26, 2002) at ¶ 39.

<sup>7</sup> 47 C.F.R. §54.708.

On August 1, 2001, ABC Cellular sold its ownership interests in the paging business to a third party known as City Page and Cellular Service (“City Page”).<sup>8</sup> The Sales Agreement provided that City Page was entitled to all revenue effective and subsequent to June 1, 2001.

In the past, ABC Cellular has timely filed all necessary USF reporting documents with the appropriate reporting agency. In each instance, ABC Cellular met the §54.706(c) exemption (“de minimis”) and as such, was not required to submit a contribution to the universal support mechanisms.<sup>9</sup> During the first quarter of 2001, ABC Cellular was experiencing substantial lay-offs and staffing issues. On April 20, 2001, a ABC Cellular employee unfamiliar with the procedures completed and submitted a completed FCC Form 499-Q (“Form 499-Q”) reflecting the company’s first quarter revenue.<sup>10</sup> The filing was timely, as the FCC Form Worksheet for that quarter was due no later than May 11, 2001. Due to a clerical error, ABC Cellular’s employee incorrectly reported that all revenue received that quarter was interstate and disqualifying ABC Cellular from the de minimis exemption.

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<sup>8</sup> A copy of the Bill of Sale and Assignment is attached as Exhibit 2 hereto (Sales Agreement).

<sup>9</sup> See §54.706(c) which provides in pertinent part if a contributor “whose interstate end-user telecommunications revenues comprise less than 12 percent of its combined interstate and international end-user telecommunications revenues shall contribute to the federal universal service support mechanisms for high cost areas, low-income consumers, schools and libraries, and rural health care providers based ***only on such entity's interstate end-user telecommunications revenues, net of prior period actual contributions.***” (emphasis added)

<sup>10</sup> A copy of ABC Cellular’s April 20, 2001, FCC Form 499-Q is attached as Exhibit 3 hereto.

On June 26, 2001, ABC Cellular received an invoice from USAC in the amount of \$26,332.71.<sup>11</sup> Upon receipt of the invoice, ABC Cellular immediately investigated the matter and discovered the clerical error. On the same day and for numerous days subsequent to, ABC Cellular placed a large number of phone calls and left multiple messages to the phone number identified on the invoice to resolve the error.<sup>12</sup>

On July 16, 2001, after numerous attempts made by ABC Cellular to contact the appropriate billing representative, a new phone number was provided to ABC Cellular. After calling the new phone number, a billing representative opened a "trouble ticket" and ABC Cellular was informed that because Price WaterhouseCoopers was "new to the billing" they would have to call ABC Cellular back to resolve the issue. As Price WaterhouseCoopers was uncertain of the procedures and all of the necessary requirements associated with the billing, numerous conversations were held before the billing representative referred ABC Cellular to Lori Terraciano of the National Exchange Carriers Association ("NECA").<sup>13</sup> Upon contacting Ms. Terraciano, she promptly informed ABC

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<sup>11</sup> A copy of the original invoice #UNIV0040045363 and subsequent invoices are attached hereto as Exhibit 4. The final invoice lists the total amount outstanding related to the clerical error of \$14,403.73. This amount reflects the amount in dispute.

<sup>12</sup> ABC Cellular was later informed that the calls had taken place during a time when the billing responsibilities were being transferred to Price WaterhouseCoopers. Furthermore, the phone number on the original invoice (973-884-8598) was not the phone number for the appropriate billing representative. As evidence of such, later USAC invoices list a different phone number for billing questions.

<sup>13</sup> The Universal Service Fund was originally administered by the National Exchange Carrier Association (NECA). See Universal Service: A Report on the Universal Telephone Service Programs administered by the National Exchange Carrier Association, Inc., 10-91-6500 (1991). The responsibilities now lie with the Universal Service Administrative Company, a wholly owned subsidiary of NECA. See 47 C.F.R. § 54.702 (b); See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-292, (rel. October 8, 1999).

Cellular that a revised Form 499-Q should be filed. Immediately thereafter, ABC Cellular submitted the revised Form 499-Q on September 6, 2001.<sup>14</sup>

During the same time period that ABC Cellular was working with Price WaterCoopers and NECA, ABC Cellular was involved with the sale of the relevant paging business. The Agreement provided that City Page was to acquire all of ABC Cellular's paging service and would be responsible for revenue effective and subsequent to June 1, 2001. The Agreement was entered into on August 1, 2001. As ABC Cellular continued to be the rightful owner of the paging services during the same time period, ABC Cellular made numerous good faith efforts to correct the clerical error and submitted the revised Form 499-Q.

On December 18, 2001, USAC issued a decision to reject the revision of ABC Cellular's original Form 499-Q because "it was not filed prior to the July 31, 2001 revision deadline."<sup>15</sup> On December 27, 2001, within the thirty day time period allotted for an appeal, ABC Cellular filed an appeal with USAC that summarized the clerical error, the multiple instances that ABC Cellular had taken to rectify the error with USAC's billing representatives and the confusion and disinformation that ABC Cellular had received from the same USAC's billing representatives.<sup>16</sup> On April 19, 2002, USAC issued a decision which refused to accept ABC Cellular's revised Form 499-Q Worksheet providing only that the "FCC Form 499-Q on September 27, 2001, [was] well outside of the revision

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<sup>14</sup> A letter addressed to Ms. Lori Terraciano of NECA detailing the numerous efforts ABC Cellular made to correct the error along with the amended 499-Q and 499-A are attached hereto as Exhibit 5.

<sup>15</sup> A copy of the December 18, 2001 decision is attached hereto as Exhibit 6.

<sup>16</sup> A copy of the December 27, 2001 appeal is attached hereto as Exhibit 7.

deadline of August 1, 2001.”<sup>17</sup> ABC Cellular files this Request for Review because ABC Cellular made numerous good faith efforts to correct the clerical error and USAC lacks the authority to reject its revised worksheet as untimely filed.

## **II. QUESTION PRESENTED FOR REVIEW**

The Commission’s Rules provide that a request for review state the questions presented for review, with reference to the relevant Commission rule, order, or statutory provision.<sup>18</sup>

The first question presented herein is whether ABC Cellular, a party whom has demonstrated prior compliance with Commission Rules and exercised good faith by making prompt and numerous efforts to rectify a clerical error, should be denied the right to file a revised Form 499-Q.

The second question presented herein is whether USAC, acting independently of the Commission, may adopt policy that is above and beyond its delegated authority that it is provided by the Commission.

In addition to the Orders cited herein, the Commission is referred to its Universal Service Rules, particularly 47 C.F.R. §§54.702, 709, 711 and 713 and its FCC Forms 499A, 499Q, the USF worksheets and instructions.

### **A. ABC Cellular Exercised Good Faith**

Then Commission Rule §54.709(d) provides that “[i]f a contributor fails to file a Telecommunications Reporting Worksheet by the date on which it is due, the Administrator shall bill that contributor based on whatever relevant data the Administrator has available...”

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<sup>17</sup> See Exhibit 1.

<sup>18</sup> 47 C.F.R. § 54.721(b).

As previously stated, ABC Cellular filed its original Form 499-Q for the second quarter of 2001 timely on April 20, 2001. Upon discovery of a clerical error on the April 20<sup>th</sup> filing, ABC immediately sought to rectify the error by filing a revised Form 499-Q. The aforementioned rule does not specifically address “revised filings.” Furthermore, the rule allows for the Administrator to bill on “whatever relevant data the Administrator has available,” which suggests that the contributor has not filed *any* worksheet. Thus, revised filings do not seem to be contemplated by the rule.<sup>19</sup> Therefore a waiver of the rule is not necessary.

In the alternative, should the Commission determine that the rule does apply to revised filings, a party requesting a waiver of a Commission rule must show that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>20</sup>

On July 26, 2001, the first date ABC Cellular received an invoice alerting it to the clerical error, officials at ABC Cellular immediately began taking steps to remedy the problem. However, due to an incorrect phone number being listed on the July USAC invoice, unreturned voicemail messages left with USAC billing representatives, and billing representatives initially reporting they were “new to billing” and would “get back to you,” ABC Cellular’s numerous efforts to correct the

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<sup>19</sup> The FCC Form 499-Q Instructions do provide that “revised filings must be made by the filing date for the subsequent 499 filing.” As the instructions do not serve as rules, 1) a waiver is unnecessary and 2) USAC’s delegated authority is governed by the Commission Rules and therefore has operated outside of its authority. The second point will be discussed further in Section B.

<sup>20</sup> 47 C.F.R. §1.925(b)(3).

problem were forestalled for a significant period of time. The good faith efforts undertaken by ABC Cellular constitute ample sufficient grounds for the Commission to grant a waiver.<sup>21</sup>

Furthermore, the underlying purpose of the rules would not be frustrated by a waiver of the aforementioned rule. The Commission's Rules stem from the Congressional mandate that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable and sufficient mechanisms established by the Commission to preserve and advance universal service."<sup>22</sup> As stated previously, ABC Cellular does not provide interstate service and the reporting that receives interstate revenue was in error. Secondly, disallowing a contributor from filing a revised worksheet which corrects an inaccurate Telecommunications Worksheet is inequitable and not in the best interest of the Commission. The precedent of such a decision would allow for instances where it is the contributor's advantage not to alert USAC when a clerical error results to one's benefit and an annual filing, Form 499-A, will not be filed due to a sale of the company.<sup>23</sup>

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<sup>21</sup> "...a waiver was granted where the winning bidder demonstrated prior compliance with Commission rules, good faith, or prompt action to rectify the delinquency; there was no record that the payment shortfall was part of a deliberate effort to delay payment; the public interest would not be served by rigid enforcement of the payment deadline; and some flexibility was appropriate in addressing minor delinquency with respect to the payment." Abundant Life, Inc. For a Construction Permit for a New FM Station at Hattiesburg, Mississippi, Memorandum Opinion and Order, FCC 02-56, 25 CR 1234 (released February 25, 2002) at ¶13. *See, e.g., Metricom, Inc.*, 13 FCC Rcd 890 (1998) (winning bidder's final payment returned by Mellon Bank, causing it to be late on re-submission; partial waiver granted because Metricom did not deliberately delay payment).

<sup>22</sup> 47 U.S.C. § 254.

<sup>23</sup> An annual filing allows for a true-up, as will be discussed in greater detail in the subsequent section.



**B. USAC's Actions are Beyond its Delegated Authority**

USAC is explicitly prohibited from making policy, interpreting unclear provisions of the statute or rules, or interpreting the intent of Congress.<sup>24</sup> In instances where the Commission's Rules are "unclear," USAC may not act freely, but rather is mandated to "seek guidance from the Commission."<sup>25</sup>

The relevant Commission Rules governing contributor reporting requirements are found in §§54.708 through 54.713. Two Commission Rules control in instances where the contributor submits a late filing or fails to submit a filing. Pursuant to §54.709, when "a contributor fails to file a Telecommunications Reporting Worksheet by the date on which it is due, the Administrator shall bill that contributor based on whatever relevant data the Administrator has available..." Pursuant to §54.713, "failure to file a Telecommunications Reporting Worksheet or to submit required quarterly contributions may subject the contributor to the enforcement provisions of the Act and any other applicable law." However, the USAC's delegated authority only allows for it to "advise the Commission of any enforcement issues that arise and provide any suggested response."<sup>26</sup> Furthermore, "[o]nce a contributor complies with the Telecommunications Reporting Worksheet filing requirements, the Administrator may refund any overpayments made by the contributor, less any fees, interest, or costs."<sup>27</sup> The Commission rules remain silent and make no mention of the submission of *revised* USF worksheets.

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<sup>24</sup> 47 C.F.R. § 54.702(b).

<sup>25</sup> *Id.*

<sup>26</sup> 47 C.F.R. § 54.713.

<sup>27</sup> *Id.*

As noted previously, ABC Cellular's original, albeit incorrect Form 499-Q, was filed timely on April 18, 2001. At issue is ABC Cellular's revised Form 499-Q. In the instant situation, the contributor, ABC Cellular, sought to correct a clerical error that has resulted in unwarranted assessment of fees by filing a revised Form 499-Q. As the Commission Rules do not specifically address this issue, USAC is mandated by § 54.702 (b) to "seek the guidance from the Commission." USAC's April 19, 2002, decision appears to ignore this "guidance" requirement and simply states "ABC submitted its FCC Form 499-Q on September 27, 2001, well outside of the revision deadline of August 1, 2001."<sup>28</sup>

The Commission has delegated authority to the Common Carrier Bureau to adopt administrative requirements applicable to universal support mechanisms.<sup>29</sup> As previously noted, the Commission's Rules do not address the filing of revised worksheets and do not include a deadline for the submission of revised worksheets. However, the instructions and overarching policy to Form 499-Q do address the issue of revised filings.

In March 2001, the Commission modified its existing methodology used to assess contributions that carriers make to federal universal service support mechanisms.<sup>30</sup> The Commission concluded that in addition to the annual filing required to be submitted on Form 499-A, a "carrier

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<sup>28</sup> See Exhibit 1. It is worth noting that ABC Cellular mailed the revised FCC Form 499-Q on September 6, 2001. The tragic events of September 11<sup>th</sup> and its affects upon the postal service are undoubtedly to blame for the extended time period prior to the filing be officially submitted.

<sup>29</sup> 47 C.F.R. § 54.711 which provides that the Common Carrier Bureau may "require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms."

<sup>30</sup> Federal-State Joint Board on Universal Service, Report and Order and Order on Reconsideration, FCC 01-85, 16 FCC Rcd 5748 (released March 14, 2001) (*Joint Board Order*).

will also file on a quarterly basis the new Form 499-Q to report their revenues from the prior quarter.”<sup>31</sup> To minimize confusion and ease the burden to carriers, the Commission stressed that the “revised contribution methodology will operate in a manner similar to the current methodology with only minor differences.”<sup>32</sup> While the instructions to the new Form 499-Q provided that a “revised filing must be made by the filing date for the subsequent 499 filing,”<sup>33</sup> the Commission provided that annual “true-ups” to the quarterly revenue would be done based on the annual filings. The true-ups would allow for USAC to “refund or collect from carriers any over payments or under payments.”<sup>34</sup>

The new quarterly methodology and accompanying instructions as they applied to revised filings and true-ups are consistent with the Commission’s approach on the Form 499-A. On Appendix B, Section II.E. of the Form 499-A, the Commission addressed the obligation to file revisions. Specifically the Form 499-A instructions provide:

...a telecommunications provider must file a revised worksheet if it discovers an error in the revenue data that it reports. Telecommunication providers should file revised Form 499-A revenue data by December 1 of the same filing year. Revisions ***filed after that date*** must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records. (emphasis added)

While the Form 499-A provides a preferred date for filing a revision, the Commission does not bar revisions filed after that date. The extended filing period allotted for the Form 499-A and the ability to file revisions and the true-up period for the Form 499-Q is evidence of the

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<sup>31</sup> *Id.* at ¶ 12.

<sup>32</sup> *Id.*

<sup>33</sup> FCC Form 499-Q Instructions to Telecommunications Reporting Worksheet Appendix E.

<sup>34</sup> *Joint Board Order* at ¶ 13.

Commission's desire to abide by Congress's intent specified in the aforementioned Section 254(d) of the Communications Act of 1934, as amended (the Act) which provides that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an *equitable* and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."<sup>35</sup> The Commission plainly does not desire to have contributors provide amounts in excess or inadequate amounts to the universal fund.

In the instant case, ABC Cellular sold its ownership to the paging services to City Page during the time period that the revised Form 499-Q matter was still pending before USAC. The Commission's Rules remain silent on this specific issue, barring USAC from exercising authority, but rather requiring USAC to seek Commission guidance. The Form 499-Q instructions provide that "[i]n the event that a contributor that filed a Form 499-Q no longer exists [ABC Cellular], the successor company [City Page] to the contributor's assets or operations is responsible for continuing to make payments, if any, for the funding period and must notify the Commission's Data Collection Agent."<sup>36</sup> As it is City Page's intent and desire to file the appropriate Form 499-A and Form 499-Q for the newly acquired paging services, the true-up that is contemplated in the worksheet instructions and §54.713 which provides that the "Administrator may refund any overpayment made by the contributor..." will not provide relief as any true-up will be applied to City Page and not ABC Cellular. Therefore, in the absence of a Commission Rule on this point, it is tantamount that the

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<sup>35</sup> 47 U.S.C. Sec. 254(d) (emphasis added).

<sup>36</sup> FCC Form 499-Q Instructions to Telecommunications Reporting Worksheet Appendix E.

Commission's intent continue to be served by allowing for accurate and truthful revisions to be filed and rightful parties be assessed correctly.

### **III. STATEMENT OF RELIEF SOUGHT**

Pursuant to 47 C.F.R. § 54.721(b), a request for review shall state with particularity the relief sought by the requesting party. ABC Cellular requests that the Commission reverse USAC's decision in this matter and direct USAC to accept ABC Cellular's revised Form 499-Q reporting revenue for the second quarter of 2001 and credit ABC Cellular's account by \$14,403.73, which represents the amount that was assessed based on the clerical error submitted in ABC Cellular's April 20, 2001 Form 499-Q submission.

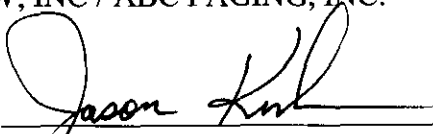
#### **IV. CONCLUSION**

WHEREFORE, the premises considered, it is respectfully requested that the Commission REVERSE USAC's decision in this matter and require USAC to accept ABC Cellular's revised FCC Form 499-Q reporting telecommunications revenues for the second quarter of 2001 and credit ABC Cellular's account accordingly.

Respectfully submitted,

ABC CELLULAR CORPORATION PAGE  
NOW, INC / ABC PAGING, INC.

By: \_\_\_\_\_

  
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Date: June 17, 2002

## AFFIDAVIT

I, Randy Simon, President of ABC Cellular Corporation Page Now Inc., / ABC Paging, Inc., do hereby declare and certify under penalty of perjury and pursuant to Section 1.16 of the Federal Communications Commission's Rules that the forgoing Request for Review is true and accurate.

ABC Cellular Corporation Page Now Inc.,  
/ ABC Paging, Inc.,

By: \_\_\_\_\_

Randy Simon

Date: \_\_\_\_\_

6/14/02